No. 78-1487

In the Supreme Court of the United States

OCTOBER TERM, 1978

FORD MOTOR COMPANY, ET AL., PETITIONERS

v.

DENNIS MILHOLLIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

JOHN J. POWERS, III
MARION L. JETTON
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1487

FORD MOTOR COMPANY, ET AL., PETITIONERS

v.

DENNIS MILHOLLIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation of June 18, 1979.

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether the Truth in Lending Act and the Regulations thereunder require the disclosure of the creditor's right to accelerate a debt upon default by the borrower.

2. Whether the Act and Regulations require a creditor to disclose whether he will rebate to the borrower unearned finance charges upon acceleration of the debt and the method of computing such rebate.

STATUTES AND REGULATIONS INVOLVED

Section 128(a)(9) of the Truth in Lending Act (15 U.S.C. 1638(a)(9)) provides:

> (a) In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:
>
> * * * * *
>
> (9) The default, delinquency, or similar charges payable in the event of late payments.

Regulation Z (12 C.F.R. 226.8(b)(4)) provides:

> (b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:
>
> * * * * *
>
> (4) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments.

Regulation Z (12 C.F.R. 226.8(b)(7)) provides:

> (b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:
>
> * * * * *
>
> (7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed.

STATEMENT

1. Respondents Milhollin, Eaton, Messinger, and Andresen purchased automobiles from various dealers, including petitioners Dee Thomason Ford, Marv Tonkin Ford Sales, Inc., and Webster-Wolfard Ford, Inc., and financed their purchases through retail installment sale contracts with petitioners. In each case, the dealers subsequently assigned the installment sale contract to petitioner Ford Motor Credit Company (Pet. App. A 2a-3a). The installment payments which respondents agreed to make included a precomputed finance charge (A. 9, 65).

The disclosure statement required by the Truth in Lending Act and Regulation Z was set forth on the front page of each contract. The disclosure statement explained how the creditor would rebate the unearned portion of the finance charge in the event that the buyer prepaid his obligation in full prior to maturity of the final installment, in the following terms (A. 9, 65):

> Prepayment Rebate: Buyer may prepay his obligations under this contract in full at any time

prior to maturity of the final installment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method after first deducting an acquisition fee of $15.00. No rebate will be made if the amount is less than $1.00.

On the reverse side of the front page, set forth separately from the disclosure statement, each contract contained an acceleration clause giving the seller the right to declare all amounts that were due or would become due under the contract "to be immediately due and payable" in the event of the buyer's default (A. 10, 66).

2. Respondents brought these four separate suits for statutory damages [1] under the Truth in Lending Act in the United States District Court for the District of Oregon against petitioner Ford Motor Credit Company and the dealers from whom they purchased their automobiles. Respondents claimed, *inter alia*, that petitioners' failure to disclose on the front page of the contract the creditor's right to accelerate the indebtedness violated the provision of the Act requiring disclosure of "[t]he default, delinquency, or similar charges payable in the event of late payments" (15 U.S.C. 1638(a)(9)) (A. 5, 58). In response, petitioners took the position that their policy was to rebate unearned finance charges upon payment after acceleration in the same manner as upon voluntary prepayment, and that the disclosures required by the Act with respect to voluntary prepayment were stated on the face of the contract (see A. 22, 68).[2]

[1] The damages recoverable by the borrower for a Truth in Lending Act violation are actual damages sustained as a result of the violation, and twice the finance charge, with a liability of not less than $100 or more than $1,000. See 15 U.S.C. 1640(a)(1). The borrower is not required to show actual damages and may also recover attorney's fees and costs. See 15 U.S.C. 1640(a)(2).

In respondent Milhollin's suit, the district court held that the Truth in Lending Act and Regulation Z require creditors "to disclose and fully explain any right of acceleration" on the face of the contract (Pet. App. 17a). However, since respondent Milhollin's contract antedated an earlier decision of the same district court giving only prospective application to the rule requiring disclosure of the right to accelerate (see *Woods* v. *Beneficial Finance Co. of Eugene*, 395 F. Supp. 9 (D. Ore. 1975)), the court declined to hold that petitioners' failure to disclose and explain their rights of acceleration violated the Act (Pet. App. B 17a-18a). The court nevertheless found a violation of the Act and ruled in favor of respondent Milhollin on the ground that petitioner Ford Motor Credit Company had not been adequately disclosed as a creditor under the contract (Pet. App. B 15a-17a, 19a-20a, 21a).[3]

[2] Respondents did not dispute the truth of petitioners' allegations that their rebate policy upon payment after acceleration was the same as upon voluntary prepayment and that the latter policy was disclosed.

[3] The district court in *Eaton* v. *Ford Credit Company* (Pet. App. B 27a-29a) adopted the rationale of the *Milhollin* decision. In *Eaton* the district court ruled that "the conclusions reached by Judge Belloni [in *Milhollin*] should govern

3. The four cases were consolidated in the court of appeals. That court first held that the district courts had erred in finding that petitioner Ford Motor Credit Company was not adequately identified as a creditor on the face of the contracts (Pet. App. A 3a-8a). It therefore addressed the additional question whether petitioners' failure to disclose the acceleration clause violated the Truth in Lending Act.

On the authority of its earlier decision in *St. Germain* v. *Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977), the court of appeals agreed with the district courts' conclusion in *Milhollin* and *Eaton* that petitioner Ford Motor Credit Company violated the Truth in Lending Act and Regulation Z "by failing to dis-

---

this case" because "[i]t has been the policy and practice of this Court to respect a fully considered opinion of another Judge of this Court * * * unless it appears that an obvious mistake has been made" and because the decision is "in accord with other federal court decisions" (Pet. App. B 28a).

Since the contract in *Eaton* was executed on June 28, 1975 (A. 65), subsequent to the February 1975 decision in *Woods*, the court in *Eaton* upheld the claim that petitioners' failure to disclose the acceleration clause violated the Act.

In the other two suits (*Messinger* v. *Ford Motor Credit Company, et al.* and *Andresen* v. *Ford Motor Credit Company, et al.* (Pet. App. B 30a-34a; 35a-39a)) the district courts did not address the question whether failure to disclose the acceleration clause violated the Act. They held for respondents on the ground that petitioner Ford Motor Credit Company was not adequately disclosed as a creditor under the contracts (Pet. App. B 31a, 36a-37a). Since the Act provides that multiple violations in connection with a single credit sale only entitle the borrower to a single recovery (see 15 U.S.C. 1640(g)) the district courts in these cases did not regard it necessary to decide the acceleration clause disclosure issue.

close an acceleration clause and its effect on unearned interest" (Pet. App. A 11a).[4] The court held in favor of respondents Millhollin and Eaton on the ground that the contracts in those cases failed to disclose petitioners' right of acceleration and to explain whether acceleration resulted in unearned interest.[5]

INTRODUCTION AND SUMMARY OF ARGUMENT

1. These cases present two important questions under the Truth in Lending Act (15 U.S.C. 1601 *et seq.*) with respect to which the courts of appeals are in disagreement, both with each other and with the Board of Governors of the Federal Reserve System, the agency directed by Congress to carry out the purpose of the Act by issuing regulations, interpretations, and official staff interpretations. The broad remedial purpose of the Act, the myriad forms in which credit transactions can occur, and the need

---

[4] The court of appeals, however, disagreed with the district court's holding in those cases that the rule imposing liability for nondisclosure of an acceleration clause could not be applied to a contract that was executed prior to the district court's decision in *Woods* v. *Beneficial Finance Co., supra*. In the court of appeals' view, the district court exceeded its authority because "[t]he application of doctrines limiting the retroactivity of judicial decisions is restricted to appellate courts" [citation omitted] (Pet. App. A 9a).

[5] Since the sole ground of the district court's decision in *Messinger* and *Andresen* was the contracts' failure to identify adequately petitioner Ford Motor Credit Company as a creditor, the court of appeals remanded those cases for consideration of respondents' other claims not reached by the district courts (see Pet. App. A 11a).

for uniformity necessarily require that the statutory and regulatory interpretations of an expert agency such as the Board be given great weight. Such interpretations are the principal administrative tool employed by the Board to ensure uniform application and enforcement of the Act and Regulation Z. As this Court observed in *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 365 (1973), "To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation." In rejecting the Board's Official Staff Interpretations with respect to the statutory questions involved in these cases, the decision below thwarts the congressional objective of providing uniform rules of credit disclosure practices.

Section 121 of the Act requires merchants who regularly extend credit, with attendant finance charges, to disclose "clearly and conspicuously, in accordance with the regulations of the Board" certain contract information "to each person to whom consumer credit is extended" (15 U.S.C. 1631(a)). Failure to disclose renders the seller liable to the consumer for a penalty of twice the amount of the finance charge, but in no event less than $100 or more than $1,000. Moreover, the maximum liability in a class action can be as much as $500,000 (15 U.S.C. 1640). The creditor may also be assessed for the costs of the litigation, including reasonable attorney's fees (*ibid.*), and may be subject to criminal penalties for willfully giving

false or inaccurate contract information or failing to give the required information (15 U.S.C. 1611). See *Mourning* v. *Family Publications Service, Inc., supra*, 411 U.S. at 361.

The Act prescribes certain disclosures that must be made by the merchant under retail installment contracts of the type involved in these cases. Specifically, the Act requires the creditor to disclose "[t]he default, delinquency, or similar charges payable in the event of late payments" (15 U.S.C. 1638 (a)(9)).

Pursuant to its general rulemaking authority "to carry out the purposes of [the Act]" (15 U.S.C. 1604), the Board has promulgated Regulation Z (12 C.F.R. 226), which defines and amplifies the circumstances in which a seller who regularly extends credit must make the disclosures required by the Act. The Regulation provides that "Any creditor when extending credit other than open end credit" must disclose "[t]he amount or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments" (12 C.F.R. 226.8(a), (b)(4)).

The principal purpose of the Act is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit" (15 U.S.C. 1601(a)). Regulation Z requires (12 C.F.R. 226.8(b)(7)):

> [i]dentification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and

a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to an obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed.

2. Installment contracts typically grant the creditor the right to demand immediate payment of all installments upon the default of the borrower. Absent such a provision, commonly known as an acceleration clause, the creditor would be forced to sue as each installment became due and the borrower defaulted. Acceleration eliminates this time-consuming costly procedure.

Installment contracts also typically permit the borrower to prepay the obligations prior to the expiration of the terms of the loan. Because the finance charge is included in the amount of the debt at the inception of the contract, exercise of either the creditor's right to accelerate or the debtor's right to prepay in full requires a determination of the amount owing at the time the right is exercised. To determine the amount owed, it is necessary to compute how much of the finance charge added to the original debt (precomputed finance charge) has been earned and how much will be cerdited (rebated) to the consumer. This computation must be made whether the borrower discharges the obligation or whether the creditor seizes the collateral and sells it to satisfy the outstanding balance.

3. These cases present two questions under the Truth in Lending Act and Regulation Z dealing with acceleration of an installment obligation, with respect to which the Board has issued an Official Staff Interpretation. First, whether the Act requires the disclosure of the creditor's right to accelerate a debt upon default of the borrower. Second, whether the Act requires the creditor to disclose whether, and to what extent, he will rebate unearned finance charges to the borrower upon acceleration of the debt.

We submit that the Act does not require disclosure of the right of acceleration and that the decision below erred in so holding. The six other courts of appeals that have considered the question have agreed with the position of the Board staff, as expressed in its Official Staff Interpretation, that a right of acceleration is not a "default, delinquency, or similar charge[] payable in the event of late payments" (15 U.S.C. 1638(a)(9)) that is subject to disclosure under the Act.

The statute requires disclosure of "default, delinquency, and similar charges payable in the event of late payments." 15 U.S.C. 1638(a)(9), 1639(a)(7); see also 12 C.F.R. 226.8(b)(4). Although acceleration may eventually result in charges that are "payable" within the terms of the statute, the remedy itself cannot meaningfully be characterized as "payable." The charges specifically itemized in the statute —default and delinquency charges are terms of art referring to specific pecuniary sums that are owed in the event of late payments, not general creditor's remedies.

The legislative history also supports the view that the phrase "default, delinquency, or similar charges payable in the event of late payments" refers to specific monetary assessments upon the borrower that increase the cost of his credit transaction. The decision of the court below to the contrary is erroneous.

4. a. While the right of acceleration need not be disclosed, the Board staff recognized that the process of acceleration may subject the borrower to additional costs that must be disclosed if the consumer is to be "given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit." H. R. Rep. No. 1040, 90th Cong., 1st Sess. 13 (1967). In determining whether such additional costs are subject to required disclosure under the Act, the Board staff took note that Regulation Z addressed the comparable problem of retention of unearned finance charges on the voluntary prepayment of a debt. Hence, if the creditor's policy on rebates of unearned finance charges upon payment after acceleration is the same as the creditor's policy already disclosed with regard to prepayments (see 12 C.F.R. 226.8(b)(7), *supra*, 2-3), the Board's position, expressed in its Official Staff Interpretation, is that the general prepayment disclosure provides sufficient description of the consequences of the equivalent process of acceleration. If, on the other hand, the policy is less favorable to the borrower, the Board staff has concluded that the difference is a charge peculiar to default that must be disclosed as a "default, delinquency, or similar charge[]" (15 U.S.C. 1638(a)(9)). See also 12 C.F.R. 226.8(b)(4).

b. The Board's Official Staff Interpretation reasonably implements the statutory policy of giving the consumer in the limited space available for setting forth the required disclosures, the information he needs to compare the cost of credit. The Board's interpretation, requiring disclosure of the method of rebating unearned interest on payment after acceleration only when it differs from the disclosed rebate policy for voluntary prepayment, is a proper exercise of its statutory responsibilities.

To be sure, the Board might have concluded, as did the court below, that disclosure of the effect of acceleration on rebate of unearned finance charges is required in all circumstances. But the fact that disclosure in all circumstances may be an equally reasonable alternative is beside the point and does not justify the court of appeals' substituting its judgment for that of the Board's staff. As this Court observed in *Mourning* v. *Family Publications Service, Inc.*, *supra*, 411 U.S. at 371-372, with respect to the Board's rule-making authority under the Truth in Lending Act, "That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority. *Northwestern Co.* v. *FPC*, 321 U.S. 119, 124 (1944); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224 (1943); *American Telephone & Telegraph Co.* v. *United States*, 299 U.S.

232, 236 (1936)." See also *United States* v. *Correll*, 389 U.S. 299, 306-307 (1967).

c. The court below rejected the Board's Official Staff Interpretation on the ground that the agency had "issued conflicting signals" (573 F.2d at 576). But the Board has consistently adhered to its interpretation since its original publication in 1974. The court of appeals misapprehended the import of the Board's rulings. And the Board's interpretation is surely no less reasonable than that of the decision below, which would require two separate and, to a considerable extent, duplicative statements explaining rebate policies.

The Board's interpretation is also at least as reasonable as the views of the other courts of appeals. In holding that the creditor's rebate policy on payment after acceleration is never required to be disclosed, the Eighth and Tenth Circuits have undermined the disclosure requirements of Regulation Z. The Third and District of Columbia Circuits have unrealistically attributed to the borrower a knowledge of state law. Finally, while the Fifth Circuit's approach most closely conforms to the official staff interpretation, it refuses to require disclosure of a creditor's unwritten policies when they differ from the contract and thereby fails to provide the borrower with the information that is most useful in comparing the cost of credit.

5. Because it is the agency charged with construing the Act, the Federal Reserve Board's interpretations of its Regulations are entitled to great

deference. Here, the rulings at issue are "official staff interpretations of the requirements of Regulation Z * * *" (Pet. App. D 52a). "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order" (*Udall* v. *Tallman*, 380 U.S. 1, 16 (1965)).

Both the Board and Congress have accorded special status to the Official Staff Interpretations. They are issued by senior officials of the Board's Division of Consumer Affairs. And Congress has provided creditors with a defense of good faith conformity with "any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue * * * interpretations" (15 U.S.C. 1640(f)). It is therefore clear that Congress intended that the courts defer to Board staff interpretations with respect to the technical questions under the Truth in Lending Act. The contrary course would create undesirable uncertainties in credit transactions and seriously undermine administration and enforcement of the Act. Indeed, the failure of the courts to uphold the Board's interpretation with respect to the questions in this case had created different rules in the various states and destroyed the very uniformity of credit disclosure practices that the Act was designed to establish.

ARGUMENT

I. THE TRUTH IN LENDING ACT AND THE REGULATIONS THEREUNDER DO NOT REQUIRE THE DISCLOSURE OF THE CREDITOR'S RIGHT TO ACCELERATE A DEBT UPON DEFAULT OF THE BORROWER

A. A Right Of Acceleration Is Not A "Default, Delinquency, Or Similar Charge Payable In The Event Of Late Payments" Within The Meaning Of The Act

1. Section 128(a)(9) of the Act, 15 U.S.C. 1638 (a)(9), requires disclosure in the consumer credit transactions involved in these cases of "default, delinquency, or similar charges payable in the event of late payments." In amplification of the statute, Regulation Z provides for disclosure of "the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments" (12 C.F.R. 226.8(b)(4)).

It is beyond dispute that these provisions require the disclosure of specific monetary assessments for late payment that add to the borrower's cost of credit. That is the accepted understanding of the terms "default [or] delinquency * * * charges." As the Third Circuit correctly pointed out in *Johnson* v. *McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 266 (1975), "In the commercial credit field and in other consumer credit legislation, the term 'delinquency charges' and 'default charges' generally refer to specific pecuniary sums that are assessed against the borrower solely because of his failure to make his payments in a timely manner. They are sums above

and beyond the amount ordinarily due in the event of timely payment."

However, creditor's exercise of the right of acceleration does not result in the imposition of any discrete charge on the debtor. It is a remedy that simply requires immediate payment of the outstanding balance due on the obligation. In no sense can the required payment of the balance due on an obligation be characterized as an "amount, or method of computing [an] amount, of * * * charges" within the meaning of Regulation Z.

Once it is recognized that a right of acceleration is not a "default [or] delinquency * * * charge[]," the only remaining statutory basis for requiring disclosure of the right of acceleration would be that it is a "similar charge". To be sure, acceleration does impose a pecuniary burden upon the borrower that could plausibly be described as a "charge".[6] But such an analysis overlooks the statutory context in which the word "charge" is placed and ascribes to it a meaning independent of its verbal moorings. It is not simply a "charge" that Congress subjected to disclosure but a "similar charge," *i.e.*, a charge "similar" to a "default [or] delinquency charge." As this Court has observed, a statutory word "does not stand alone, but gathers meaning from the words

[6] The principal authority adopting this interpretation was *Garza* v. *Chicago Health Clubs, Inc.*, 347 F. Supp. 955 (N.D. Ill. 1972). However, the Seventh Circuit has recently rejected the reasoning of *Garza* and held that an acceleration right does not impose a "charge." See *Croysdale* v. *Franklin Savings Ass'n*, No. 78-1364 (7th Cir. July 12, 1979).

around it. * * * The maxim noscitur a sociis, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). See also *National Muffler Dealers Ass'n* v. *United States*, No. 77-1172 (March 20, 1979) slip op. 13-14 & n.2. The statutory phrase "similar charge" therefore does not connote the right of acceleration.

B. The Legislative History And The Decisions Of The Courts Of Appeals Support The View That The Act Does Not Require Disclosure Of The Right To Accelerate

The legislative history of the Act confirms the correctness of the foregoing statutory construction. During its initial consideration of the legislation, Congress emphasized that the purpose of the Act was to disclose the cost of credit. Thus, for example, the Senate Banking Committee Report stated that "[a]ll installment creditors would be required to disclose the total cost of the credit in terms of dollars and cents and in terms of an annual percentage rate. In addition, all other charges incident to the transaction would be required to be set forth such as taxes, official fees, or insurance" (S. Rep. No. 392, 90th Cong., 1st Sess. 7 (1967). See also 114 Cong. Rec. 1849 (1968) (remarks of Rep. Cohelan); *id.* at 1446-1447 (remarks of Reps. Halpern, Daniels, and Hunt).[7]

[7] The congressional emphasis on disclosing the specific cost of credit is also reflected in the development of the statutory

The legislative history therefore supports the view that the phrase "default, delinquency, or similar charges payable in the event of late payments" includes only specific monetary assessments upon the borrower that increase the cost of his credit transaction. Since a non-quantifiable creditor's remedy such as acceleration does not by itself increase the cost of credit, it is not subject to required disclosure

phrase "default, delinquency, or similar charges payable in the event of late payments" (15 U.S.C. 1638(a)(9)). The original Senate bill required the disclosure of "(8) the time and amount of payments scheduled to repay the indebtedness; and (9) the terms applicable in the event of advanced or delayed payments from those specified in (8) above" (S.5, 90th Cong., 1st Sess., § 4(a) (1967); 113 Cong. Rec. 14691 (1967)). The unofficial commentary accompanying the Senate bill equated the word "terms" with monetary assessments. It speaks of disclosure of "the time and amount of payments to repay the indebtedness and the terms (*penalties*) applicable in the event of payments advanced or delayed from those specified in the contract" (113 Cong. Rec. 2049 (1967) (emphasis supplied)). When the Senate Committee reported out the bill, it changed subsection (9) to require only the disclosure of "the default, delinquency, or similar charges in the event of late payments."

While there is no explanation for this change, the reasonable inference to be drawn is that the narrower amended version of the statute was intended to clarify the original congressional understanding that the disclosure requirements covered only specific monetary assessments triggered upon delinquency and not general remedies such as the right of acceleration. Indeed, the House Committee report accompanying the amended version of the statute supports this analysis. In commenting upon the disclosure requirements applicable to nonopen-end credit, it stated that "The number, amount, and due dates of the payments must also be disclosed, as well as any penalty for late payments" (H.R. Rep. No. 1040, 90th Cong., 2d Sess. 25 (1968).

as a "charge" under the Act.[8]

2. Without addressing the statutory language and legislative history discussed above, the court below ruled that the Act required the disclosure of an acceleration clause. In so holding, the court disregarded the uniform decisions of five circuits to the contrary, as well as the Official Staff Interpretation of the Board, that the right of acceleration is not a "default, delinquency, or similar charge payable in the event of late payments." *Johnson* v. *McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir. 1975); *McDaniel* v. *Fulton National Bank of Atlanta*, 571 F.2d 948 (5th Cir. 1978) (en banc), clarified 576 F.2d 1156, 1157 (1978) (en banc); *Griffith* v. *Superior Ford*, 577 F.2d 455 (8th Cir. 1978); *Begay* v. *Ziems Motor Co.*, 550 F.2d 1244 (10th Cir. 1977); *Price* v. *Franklin Investment Co.*, 574 F.2d 594, 604

[8] This understanding of the legislative history has been adopted by both the Federal Reserve Board and by Senator Proxmire, one of the authors of the Act. In 1976, the Board recommended to Congress that the statute be amended to require only the disclosure of charges payable in the event of delinquency or late payment. The Board regarded the phrase "default charges" as misleading because it possibly referred to all charges that might be assessed upon default. See *Federal Reserve Board Annual Report*, App. C, p. 36 (1976).

In 1977, Senator Proxmire introduced a bill that would change the phrase "default, delinquency, or similar charges payable in the event of late payments" to read "[a]ny monetary charge payable in the event of a late payment or delinquency." S. 1312, 95th Cong., 1st Sess. § 11a(a)-(b) (1977); 123 Cong. Rec. S6021 (1977). The amendment is intended "to make clear that these provisions do not require disclosure of a creditor's right of acceleration upon default or other charges which are not monetary fees payable directly on default." 123 Cong. Rec. S6024 (daily ed. April 20, 1977).

(D.C. Cir. 1978).[9] See Public Information Letter No. 851 (Oct. 22, 1974), [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,173, Pet. App. E 57a-58a). See also Official Staff Interpretation, No. FC-0054 (Apr. 4, 1977), 42 Fed. Reg. 18056 (1977), [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,552, Pet. App. D 52a-53a; Public Information Letter No. 1324 (Nov. 14, 1978), [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,827, Pet. App. G 61a-63a. See also Comment, *Acceleration Clause Disclosure Under the Truth in Lending Act*, 77 Colum.L.Rev. 649, 651-659 (1977).

St. Germain v. *Bank of Hawaii*, 573 F.2d 572 (1977), an earlier decision of the Ninth Circuit by which the court below regarded itself bound (Pet. App. A 8a-9a, 11a), is not to the contrary. The court in that case did not hold that the right of acceleration clause was subject to disclosure under the Act. Rather, it appears to have agreed with the Board's Official Staff Interpretation, No. FC-0054

[9] The Seventh Circuit has now likewise held that a right of acceleration is not a "charge" subject to disclosure. See *Croysdale* v. *Franklin Savings Association, supra.* The Fifth Circuit has adhered to its view that disclosure of the mere right of acceleration is not required but that the creditor's policy of rebating unearned finance charges upon payment after acceleration must be disclosed if it is less favorable to the borrower than the policy for such rebates upon voluntary prepayment. See *Kennedy* v. *Plaza Pontiac, Inc.*, 589 F.2d 161 (5th Cir. 1979); *Burley* v. *Bastrop Loan Co.*, 590 F.2d 160 (5th Cir. 1979). The Tenth Circuit continues to hold that no disclosures are ever required with respect to an acceleration clause. See *United States* v. *One 1976 Chevrolet Station Wagon*, 585 F.2d 978 (10th Cir. 1978).

supra, Pet. App. D 52a-53a, that the statutory phrase "default, delinquency, or similar charges in the event of late payments" refers to specific sums assessed against the borrower so that "[t]he mere right to accelerate contained in a contractual provision * * * is not a *charge* payable in the event of late payment" (emphasis in original) (see 573 F.2d at 574).[10] There is accordingly no convincing basis in the terms of the statute, the legislative history, or even in the prior decisions of the Ninth Circuit, for the conclusion of the decision below that a right of acceleration, without more, is required to be disclosed under the Act. The court below therefore erred in finding a violation of the Act on the ground of petitioners' "failure to disclose the acceleration clause" (Pet. App. A 9a).

[10] Despite its agreement that it should follow the Board's construction "unless there are compelling indications that it is wrong" and that "[n]o compelling indications of error are present" (573 F.2d at 574), the Ninth Circuit in *St. Germain* purported to follow its earlier decision in *LaGrone* v. *Johnson*, 534 F.2d 1360 (1976), which held that a debtor was entitled to rescind a credit transaction because the creditor had failed to disclose an acceleration clause. But the court in *St. Germain* acknowledged that its earlied decision "assumed, without discussion, that disclosure was required" (573 F.2d at 576 n. 4). The issue litigated in *LaGrone* was whether disclosure in the underlying note, rather than in the disclosure section of the contract, satisfied the Act (see 534 F.2d at 1362).

We deal with the aspect of *St. Germain* pertaining to disclosure of the creditor's policy on rebate of unearned finance charges upon payment after acceleration at pages 26-27, *infra*.

II. THE TRUTH IN LENDING ACT AND THE REGULATIONS REQUIRE THE DISCLOSURE OF THE REBATE OF UNEARNED FINANCE CHARGES UPON ACCELERATION OF THE DEBT ONLY WHEN SUCH REBATE IS LESS FAVORABLE TO THE BORROWER THAN THE DISCLOSED REBATE DUE UPON VOLUNTARY PREPAYMENT

A. The Federal Reserve Board Official Staff Interpretation With Respect To Disclosure Of The Rebate Upon Acceleration Is Supported By The Language Of The Act And Regulations And Reasonably Furthers The Congressional Purpose Of Informing The Borrower Of The Cost Of Credit

1. The extent to which the creditor will rebate unearned finance charges in the event of early termination of an installment contract in which the finance charge is included in the debt, is an important consideration in comparing the cost of credit. Hence, even though the Act is silent on the question of disclosure of such rebates, the Board has promulgated Regulation Z which requires the creditor to identify "the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation" or to disclose the fact that "the credit contract does not provide for any rebate of unearned finance charges upon prepayment * * *" (12 C.F.R. 226.8(b)(7)).

By means of an Official Staff Interpretation, the Board has construed this provision of Regulation Z to require separate disclosure of the creditor's rebate policy upon payment after acceleration only when such rebate is less favorable to the borrower than the amount that would have been rebated under the

disclosed prepayment rebate policy. Under this official interpretation, the difference between the acceleration rebate and the prepayment rebate represents a "default, delinquency, or similar charge[] payable in the event of late payments" (15 U.S.C. 1638(a)(9)) that is subject to required disclosure under the Act and Regulation Z (12 C.F.R. 226.8(b)(4)). See Pet. App. D 53a; Pet. App. E 57a-58a.

This construction is entirely consistent with the Act and Regulation Z. It is any additional amount retained by the creditor upon acceleration above and beyond the amount retained upon voluntary prepayment that is a "charge" peculiar to acceleration upon default. On the other hand, if there is no difference between the disclosed rebate on voluntary prepayment and that upon acceleration then there is no charge that is peculiar to the borrower's default and no need for further disclosure.

Moreover, the Board's position carries out the congressional purpose of informing the borrower of the cost of credit. If the rebate in the event of voluntary prepayment and payment after acceleration is the same and the creditor discloses the rebate policy with respect to voluntary prepayment, there is no significant public policy served by providing the borrower with a redundant separate disclosure of the rebate policy on acceleration, as the Ninth Circuit required in *St. Germain* and the instant cases.

Finally, the Official Staff Interpretation represents a practical accommodation of the policy of providing

the borrower with the most important information in the limited space available for disclosures under the Act. In order to make it more likely that the borrower will actually read the items subject to disclosure, the Board requires that the prescribed statements "be made together on either: (1) The note or other instrument evidencing the obligation on the same side of the page and above the place for the customer's signature, or (2) [o]ne side of a separate statement which identifies the transaction" (12 C.F.R. 226.8(a)). The Board Staff could therefore reasonably interpret the Regulations in favor of excluding redundant information from required disclosure when the effect of such disclosure would be to discourage the consumer from reading the material.[11] See *Croysdale* v. *Franklin Savings Association*, *supra*, slip op. 11.

In sum, the Board has reasonably ruled that compared to certain other credit terms, the creditor's

[11] Indeed, the Board has recommended, and Congress is now considering, legislation to modify the disclosure requirements to avoid providing so much detail that the consumer is dissuaded from reading anything. In its report on the Truth in Lending Simplification and Reform Act (S. 108, 96th Cong., 1st Sess. (1979)), the Senate Committee on Banking, Housing, and Urban Affairs recently stated (S. Rep. No. 96-73, 96th Cong., 1st Sess. 2 (1979)): "There is considerable evidence * * * that disclosure forms given consumers are too lengthy and difficult to understand." The Committee further noted that it is necessary, but difficult to "balance[] the competing considerations of complete disclosure so that the consumer is fully informed and the need to avoid providing so much information that the consumer is discouraged from studying it" (*id.* at 3).

rebate policy after payment resulting from default and acceleration is not so important as to justify duplicative disclosure statements. As long as the rebate on payment after acceleration is the same as upon voluntary prepayment, the disclosures already provided on prepayment rebates offer the borrower sufficient and accurate information.

2. In rejecting the rationale of Official Staff Interpreparation, No. FC-0054, *supra*, the Ninth Circuit in *St. Germain* concluded that the agency staff ruling was not entitled to great weight because the Board had "issued conflicting signals" (573 F.2d at 576) in its construction of the Act and Regulation Z. In the court's view, the interpretations were contradictory because they addressed the acceleration disclosure question on the assumption that acceleration was equivalent to prepayment and also in terms of the statutory term "charge."

But the "prepayment" and the "charge" analyses are not mutually exclusive. Payment resulting from acceleration is, as the Board staff has correctly concluded, comparable to voluntary prepayment, which similarly involves early discharge of the loan obligation. Since the creditor's rebate policy on prepayment is already subject to disclosure, the Board staff has consistently interpreted Regulation Z since 1974 (see Pet. App. E 57a) to require a separate disclosure statement with respect to payment after acceleration only when the rebate in that event is different than the prepayment rebate. When the rebate in the case of payment resulting from acceleration is less than the prepayment rebate, acceleration results in a

"charge" peculiar to the borrower's default that is subject to disclosure under the Act. This interpretation is surely no less reasonable than that of the Ninth Circuit, which would require two separate and, to a considerable extent, duplicative statements explaining rebate policy without regard to whether the consumer will actually benefit from them.

B. The Board's Official Staff Interpretation Is At Least As Reasonable As The Decisions Of The Various Courts Of Appeals

The official staff construction is likewise at least as reasonable as the views of the other courts of appeals. The Tenth and Eighth Circuits have held that the creditor's rebate policy on payment after acceleration is never required to be disclosed. In *Begay* v. *Ziems Motor Co., supra*, 550 F.2d at 1247-1249, the Tenth Circuit concluded that prepayment and the right of acceleration were "conceptually antithetical" because "[t]he former is the unilateral act of the debtor; [while] the latter is the unilateral act of the creditor" (539 F.2d at 529). But this observation overlooks the fact that both voluntary prepayment and payment after acceleration involve early payment of the debt.

The Eighth Circuit's decision employs a similarly erroneous analysis. In *Griffith* v. *Superior Ford, supra*, 577 F.2d at 459-460, that court declined to construe the prepayment disclosure provision of Regulation Z (12 C.F.R. 226.8(b)(7)) to require disclosure of the creditor's rebate policy upon acceleration. As the court stated, "We are unwilling to usurp the prerogatives of the Board" (577 F.2d at 460). But in so narrowly construing Regulation Z, the court

focused only upon the situation where the creditor's rebate policy upon payment after acceleration is the same as the disclosed policy upon voluntary prepayment (see *id.* at 460 n.6). It thus failed to take into account the case where the creditor has a more onerous rebate policy upon payment following acceleration, which results in a "charge" peculiar to default.

The Third and District of Columbia Circuits have likewise failed to consider the practicalities inherent in the typical consumer credit transaction. Those courts have held that where the contract or state law requires a rebate of unearned interest, the state law becomes part of the contract and the creditor need not disclose his rebate policy. See *Johnson* v. *McCrackin-Sturman Ford, Inc.*, *supra*, 527 F.2d at 267-268; *Price* v. *Franklin Investment Co.*, *supra*, 574 F.2d at 604-605. But the fact that state law may govern a particular credit contract begs the question whether a creditor's rebate policy is subject to required disclosure as a "charge" peculiar to default. The rule of these cases fails to consider the case where the rebate policy upon payment after acceleration is less favorable to the borrower than the policy upon voluntary prepayment. Moreover, these decisions impractically attribute to the borrower a knowledge of the state law, an assumption squarely at odds with the disclosure policies underlying the Act.

The appellate authority that comes closest to upholding the Board's Official Staff Interpretation No. FC-0054 is the Fifth Circuit's *en banc* decision in *McDaniel* v. *Fulton National Bank of Atlanta*, 576

F.2d 1156 (1978). There, the court agreed with the Board's ruling that a mere right of acceleration upon default is not a "charge" and need not be disclosed. It further held that an "additional disclosure of rebate provisions of unearned interest in the event of default need not be made if these are the same as disclosed rebate provisions in the event of voluntary prepayment" (*id.* at 1157). But the Fifth Circuit's approach goes beyond the view expressed in Official Staff Interpretation, No. FC-0054 in one significant respect. The court concluded that "if the creditor possesses under his contract the right to retain more unearned interest in the event of accelerated payment pursuant to default than in that of voluntary prepayment, or if he possesses the right to impose any additional charge whatever in the event of default, then the existence of that right in him must be disclosed—and this entirely without regard to whether or how he *exercises* that right in the event" (emphasis in original) (*ibid.*).

To be sure, the Fifth Circuit's requirement of disclosure of the creditor's contractual rights will inform the borrower of his maximum potential liability under the arrangement. But it is more important that the borrower understand what the creditor will actually do upon default. Thus, for example, the Board staff has reasonably concluded that where the contract is silent, it is "the individual creditor's policy [that] determines whether there is a violation of the Act and regulation." Public Information Letter No. 1208 (July 6, 1977), [1974-1977 Transfer Binder] Cons.

Cred. Guide (CCH) ¶ 31,647, Pet. App. F 60a. So too, if the creditor's policy is not to enforce certain of his contractual rights, that policy should likewise be subject to disclosure under the Act. The Fifth Circuit's approach fails to provide the borrower with the information most useful to him in comparing the cost of credit, viz., the creditor's actual practices, by including such practices in the disclosure statement.

III. AS THE AGENCY CHARGED WITH CONSTRUING THE ACT, THE FEDERAL RESERVE BOARD'S INTERPRETATIONS OF ITS REGULATIONS ARE ENTITLED TO DEFERENCE

A. We submit that the foregoing discussion demonstrates that the Board's Official Staff Interpretation with respect to disclosure of a creditor's unearned finance charge rebate policy upon payment after acceleration is, at the least, no less reasonable than any of the views of the courts of appeals. As we have pointed out (*supra*, pages 13-18), it is not necessary to show that the agency's interpretation is preferable to any other solution to the problem. This Court has "consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." *Mourning* v. *Family Publications Service, Inc.*, *supra*, 411 U.S. at 371-372. Here, Congress has enacted remedial legislation and conferred broad rulemaking authority upon the Federal Reserve Board, the agency expert in the myriad forms of credit transactions (15 U.S.C. 1604). Its

interpretation should therefore be upheld if it is "reasonably related to the purposes of the enabling legislation" (*Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280-281 (1969) and "within the bounds of [its] administrative powers" (*American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, 236 (1936)). See also *American Trucking Ass'ns* v. *United States*, 344 U.S. 298 (1953).

If the Board had promulgated its policy governing disclosure of acceleration rights and attendant rebate of unearned interest in the form of a Regulation, there would be no question that its views would be entitled to deference. As this Court noted in *Mourning* v. *Family Publications Service, Inc.*, *supra*, 411 U.S. at 365, 368, in upholding the "Four Installment Rule" of Regulation Z, "in addition to granting to the Board the authority normally given to administrative agencies to promulgate regulations designed to 'carry out the purposes' of the Act, Congress specifically provided * * * that the regulations may define classifications and exceptions to insure compliance with the Act (footnote omitted)" (see 15 U.S.C. 1604).

But the fact that the Board's rulings with respect to the questions presented in this case took the form of an Official Staff Interpretation does not reduce their significance as the views of an expert agency. The rulings of the Board at issue here are "official staff interpretations of the requirements of Regulation Z * * *" (Pet. App. D 52a) to which Congress

itself has accorded special status. In 1974, Congress amended the Act (Pub. L. No. 93-495, Section 406, 88 Stat. 1518) to insulate creditors from civil and criminal liability if they acted in good faith reliance upon the Board's interpretations. The 1974 amendment provided (15 U.S.C. 1640(f)):

> No provision of this section [relating to civil liability] or section 112 [relating to criminal liability] shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

As the Senate Report accompanying this provision [12] explained (S. Rep. No. 93-278, 93d Cong., 1st Sess. 13-14 (1973)): "The Truth in Lending Act is highly technical and the Committee does not have believe a creditor should be forced to choose between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act."

In 1976, Congress determined that insulating creditors from liability for good faith reliance upon the

[12] The provisions were reported by the Senate Committee as part of S. 2101 (see S. Rep. No. 93-278, 93d Cong. 1st Sess. (1973)), and were later incorporated by the Senate in floor amendments to the bill, H.R. 11221, that was enacted, with amendments, as Pub. L. No. 93-495. See 120 Cong. Rec. 19209-19214 (1974).

Board's rules, regulations, or interpretations did not provide sufficient certainty with respect to the host of technical disclosure questions covered by opinions issued by the Board's staff. Congress therefore again amended the Act by extending the immunity for good faith reliance upon Board interpretations to any act done or omitted in good faith "in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor * * *" (Pub. L. No. 94-222, Section 3b, 90 Stat. 197, amending 15 U.S.C. 1640(f)).[13] In explaining the provision to the House, Representative Annunzio, Chairman of the Subcommittee on Consumer Affairs of the House Committee on Banking, Currency and Housing, stated as follows (122 Cong. Rec. 11280 (1976)):

> Creditors are often hit with costly lawsuits for unintentional technical violations because, even though they attempt to comply, the laws and regulations are too complicated and ambiguous. * * *
>
> *With formal advisory opinions, creditors will at last have a reliable way to know how to com-*

[13] Although petitioners claimed that the 1976 amendment absolved them from liability because they acted in conformity with the Official Staff Interpretation, the court of appeals did not address this question. The Board has not yet ruled as to the effect of 1976 amendment on contracts entered into prior to its enactment. See generally, *e.g.*, Public Information Letter No. 638 [1969-1974 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 30,897.

ply with Truth in Lending. Consumers should benefit because creditors will no longer be able to explain away violations by claiming they could not find out how to comply. Consumers, creditors, and the Board should find they are involved in less litigation (emphasis supplied).

See also 122 Cong. Rec. 2852 (1976) (remarks of Reps. Annunzio and Rousselot); *id.* at 2836 (remarks of Sen. Garn).

The legislative history accompanying the 1976 amendments therefore demonstrates beyond question that Congress intended to eliminate challenges of the type involved in this case. By immunizing creditors who conform to the Board's rulings, Congress intended that the courts defer to the Federal Reserve Board with respect to the technical questions arising under the Truth in Lending Act, whether the Board issues its rules in the form of Regulations or Official Staff Interpretations.

B. Given "the myriad forms in which credit transactions [can] occur[]" (*Mourning* v. *Family Publications Service, Inc., supra,* 411 U.S. at 365) and the potential for imposition of both civil and criminal penalties for violations of the Act, the need for Official Staff Interpretations to provide certainty to creditors is self-evident. This case illustrates the fact that no set of Regulations, no matter how detailed, could speak to every available type of credit arrangement. The Board therefore early recognized that it would be necessary to provide creditors with technical guidance to elaborate upon the meaning of

the Regulations. As a result, the Board began to issue interpretations of the Regulations even before the July 1, 1969 effective date of the Regulations. See 12 C.F.R. 226.101 *et seq.* Moreover, in 1969, the Board's staff began to issue Public Information Letters explaining the application of the Act and Regulation Z to specific types of credit transactions. See [1969-1974 and 1974-1977 Transfer Binders] Cons. Cred. Guide (CCH).[14]

The Board's Official Staff Interpretations and Public Information Letters play a vital role in its administration of the Act. As the Board recognized in 1971, three years after passage of the Act, its staff opinions "were an essential part of its operations" and "the public [was] entitled to rely on a formal staff opinion unless and until it is altered by the Board after formal consideration." Public Information Letter No. 444 [1969-1974 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 30,640.[15] And after

---

[14] Since the passage of the Act in 1969, the Board's staff has issued 1,342 Public Information Letters and approximately 160 Official Staff Interpretations explaining and applying the Act and Regulation Z.

[15] In Public Information Letter No. 444, the Deputy Secretary of the Board stated:

* * * *

> A staff opinion represents the informed view of the particular official responding to the inquiry, who is authorized by the Board to express opinions on the particular subject. While it is possible that in some instances it might not represent the position which the Board members themselves would take if they formally considered the issue, the Board considers the present informal and flexible procedure, by which members of its staff provide

Congress accorded enhanced status to the Board's Official Staff Interpretations upon enactment of the 1976 amendment, the Board designated "the Director and other officials of the Division of Consumer Affairs as officials 'duly authorized' to issue, at their discretion, official staff interpretations * * *" (12 C.F.R. 226.2(d)(3), Appendix, *infra*, 2a. Indeed, Official Staff Interpretation, No. FC-0054, *supra*, Pet. App. D 52a-56a, which addresses the two questions presented in this case, was issued pursuant to this procedure.[16]

opinions on regulatory provisions, an essential part of its operations.

It is the Board's view that the public is entitled to rely on a formal staff opinion unless and until it is altered by the Board after formal consideration. Where the issue involves a statement of legal position, it may be assumed that while the question discussed has not been presented to, nor reviewed by the Board, such view is believed by the staff to be legally sound and judicially sustainable, and would be recommended by the staff for Board adoption should the matter be presented to the Board. * * *

[16] At the time Office Staff Interpretation, No. FC-0054 was issued, the Regulations provided that the type of interpretation issued by the Board and designated officials would be determined by the following criteria (12 C.F.R. 226.1(d)(4) (1977), Appendix, *infra*, 2a-3a):

(i) Official Board interpretations will be issued upon those requests which involve potentially controversial issues of general applicability dealing with substantial ambiguities in this Part and which raise significant policy questions.

(ii) Official staff interpretations will be issued upon those requests which, in the opinion of the designated official, require clarification of technical ambiguities in this Part or which have no significant policy implications.

(iii) Unofficial staff interpretations will be issued where the protection of section 130(f) of the Act is neither requested nor required, or where time strictures require a rapid response.

Interpretations could be reconsidered by the Board upon request of a member of the public (12 C.F.R. 226.1(d)(2) (1977)).

The Regulation was amended in April 1978, to permit requests for public comment within 30 days of publication of the interpretation. The effective date of the interpretation is deferred for at least 30 days to permit the submission of such requests. See 43 Fed. Reg. 18539-18540 (1978), amending 12 C.F.R. 226.1(d), Appendix, *infra*, 3a-4a.

C. In light of the careful consideration that accompanies the issuance of the Board's Staff Interpretations and the importance that Congress attributes to them, the confidence with which the courts have regarded such rulings is understandable. Indeed, apart from the decisions dealing with the questions presented in this case, the courts of appeals have generally accorded appropriate deference to the Staff Interpretations of the Board. See *e.g.*, *Gantt* v. *Commonwealth Loan Co.*, 573 F.2d 520, 522-524 (8th Cir. 1978); *Bone* v. *Hibernia Bank*, 493 F.2d 135, 140 (9th Cir. 1974); *Philbeck* v. *Timmers Chevrolet, Inc.*, 499 F.2d 971, 976-977 (5th Cir. 1974); *Croysdale* v. *Franklin Savings Association*, *supra*, slip op. 7 n. 4. See also *Johnson* v. *McCrackin-Sturman Ford, Inc.*, *supra*, 527 F.2d at 267-268.[17]

[17] In *St. Germain*, the Ninth Circuit prefaced its consideration of Official Staff Interpretation, No. FC-0054, with the following observation (573 F.2d at 574) (emphasis supplied): "Although we are not bound by the Board's official interpreta-

Here, the Board staff concluded, in light of its specialized experience, that Regulation Z requires the disclosure of a creditor's rebate policy on unearned interest upon payment after acceleration only if it is less favorable to the borrower than the rebate policy upon voluntary prepayment, which is already subject to disclosure. The appraisal of the relative importance of various contract terms to prospective borrowers and the determination of the most useful method of informing the borrower of the cost of credit involve precisely the sorts of policy decisions that Congress intended to leave to the special expertise of the Board and its staff. There is accordingly no basis for the court of appeals' rejection of the Board's Official Staff Interpretation, No. FC-0054 in this case. As this Court admonished in *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." Accord: *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971); *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 717-719 (1975).

tion of Regulation Z nor by a staff opinion letter, both are entitled to respect; we should follow the Board's construction 'unless there are compelling indications that it is wrong.' (*Moore* v. *Great Western Savings & Loan Ass'n* (9th Cir. 1975) 513 F.2d 688, 690). *No compelling indications of error are present*" (emphasis supplied).

In sum, this case graphically shows that failure of the courts to uphold the Board's Official Staff Interpretations will seriously undermine administration of the Act. With respect to the questions presented as to the right of acceleration and the attendant rebate of unearned interest, the disarray among the courts of appeals has resulted in different disclosure rules in the various states, and destroyed the very uniformity of credit disclosure practices that the Act was designed to establish.[18] The congressional promise of "assur[ing] a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him * * *" (15 U.S.C. 1601(a)) will be thwarted if the various courts feel free to "choose the direction

[18] Judicial rejection of the Board's Official Staff Interpretations will also prevent effective enforcement of the Act and Regulations. While the Board is charged with promulgating Regulations to implement the Act (15 U.S.C. 1604), the Act provides for administrative enforcement, depending on the type of creditor, by the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, the National Credit Union Administration, the Civil Aeronautics Board, the Secretary of Agriculture, the Farm Credit Administration, and the Federal Trade Commission (15 U.S.C. 1607). If the courts decline to uphold official staff interpretations, the numerous agencies that periodically examine institutions for compliance with consumer protection laws face a far more difficult task. The Board and four of the enforcing agencies have recently adopted uniform enforcement guidelines in an attempt to improve enforcement (see 44 Fed. Reg. 1222 (1979)), but this effort will be hampered if the agencies cannot rely with confidence upon the Board's Official Staff Interpretations.

that makes more sense to [them] * * *" (573 F.2d at 576-577). Only by judicial deference to the Board's Official Staff Interpretations can that congressional promise be achieved.

CONCLUSION

The judgments of the court of appeals in *Milhollin* and *Eaton* should be reversed. The judgments of the court of appeals in *Messinger* and *Andresen*, remanding the cases for consideration of issues not yet decided, should be affirmed.[19]

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

JOHN J. POWERS, III
MARION L. JETTON
Attorneys

SEPTEMBER 1979

[19] Since it is undisputed in the *Milhollin* and *Eaton* cases, that petitioners' rebate policy upon payment after acceleration was the same as its disclosed policy upon voluntary prepayment (see A. 22, 68; page 5, note 2, *supra*), a decision by this Court upholding the Board's Official Staff Interpretation disposes of respondents' remaining claims in those cases. However, in the *Messinger* and *Andresen* cases, the district court has yet to rule upon respondents' acceleration disclosure claims (see pages 5-6, note 3, *supra*).

APPENDIX

Section 105 of the Truth in Lending Act (15 U.S.C. 1604) provides:

> The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

Section 130 of the Act was amended in 1974 by Pub. L. No. 93-495, Section 406, 88 Stat. 1518, as follows:

> (f) No provision of this section [Civil Liability] or section 112 [Criminal Liability] shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

In 1976, Section 130(f) of the Act (15 U.S.C. 1640(f)) was expanded to include staff interpretations:

> (f) No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith

in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

The Board implemented the 1976 amendment, 42 Fed. Reg. 2950 (Jan. 14, 1977), by adopting Section 226.1(d)(3) of Regulation Z, which read:

> (3) Pursuant to section 130(f) of the Act, the Board has designated the Director and other officials of the Division of Consumer Affairs as officials 'duly authorized' to issue, at their discretion, official staff interpretations of this Part. This designation shall not be interpreted to include authority to approve particular creditors' forms in any manner.
>
> (4) The type of interpretation issued will be determined by the Board and the designated officials by the following criteria:
>
> (i) Official Board interpretations will be issued upon those requests which involve potentially controversial issues of general applicability dealing with substantial ambiguities in this Part and which raise significant policy questions.
>
> (ii) Official staff interpretations will be issued upon those requests which, in the opinion of the designated officials, require clarification of technical ambiguities in this Part or which have no significant policy implications.
>
> (iii) Unofficial staff interpretations will be issued where the protection of section 130(f) of the Act is neither requested nor required, or where time strictures require a rapid response.

On April 21, 1978, the Board revised its procedures for issuance of official staff interpretations to read as follows (see 43 Fed. Reg. 18539-18540 (1978)):

> 226.1(d) *Issuance of staff interpretations.* (1) Unofficial staff interpretations will be issued at the staff's discretion where the protection of section 130(f) of the Act is neither requested nor required, or where a rapid response is necessary.
>
> (2)(i) Official staff interpretations will be issued at the discretion of designated officials. No such interpretation will be issued approving creditors' or lessors' forms or statements. Any request for an official staff interpretation of this Part must be in writing and addressed to the Director of the Division of Consumer Affairs, Board of Governors of the Federal Reserve System, Washington, D.C. 20551. The request must contain a complete statement of all relevant facts concerning the credit or lease transaction or arrangement and must include copies of all pertinent documents.
>
> (ii) Within 5 business days of receipt of the request, an acknowledgment will be sent to the person making the request. If, in the opinion of the designated officials, issuance of an official staff interpretation is appropriate, it will be pub-

lished in the Federal Register to become effective 30 days after the publication date. If a request for public comment is received, the effective date will be suspended. The interpretation will then be republished in the Federal Register and the public given an opportunity to comment. Any official staff interpretation issued after opportunity for public comment shall become effective upon publication in the Federal Register.

(3) Any request for public comment on an official staff interpretation of this Part must be in writing and addressed to the Secretary, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, and postmarked or received by the Secretary's office within 30 days of the interpretation's publication in the Federal Register. The request must contain a statement setting forth the reasons why the person making the request believes that public comment would be appropriate.

(4) Pursuant to section 706(e) of the Act, the Board has designated the Director and other officials of the Division of Consumer Affairs as officials 'duly authorized' to issue, at their discretion, official staff interpretations of this Part.

☆ U. S. GOVERNMENT PRINTING OFFICE; 1979 300445 70